

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**

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|---------------------------------|---|------------------|
| EUGENE TYRONE MILLER, |) | |
| |) | |
| Petitioner, |) | |
| |) | |
| v. |) | 1:12CV374 |
| |) | |
| GUILFORD COUNTY SUPERIOR |) | |
| COURT¹, |) | |
| |) | |
| Respondent. |) | |

RECOMMENDATION AND ORDER
OF UNITED STATES MAGISTRATE JUDGE

Petitioner, a state prisoner, has submitted a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, together with an application to proceed *in forma pauperis*. This Petition cannot be further processed because court records reveal that Petitioner has already attacked the same conviction and sentence in a previous § 2254 petition [1:04CV545]. Consequently, Petitioner must apply to the United States Court of Appeals for the Fourth Circuit for an order authorizing this Court to consider the current Petition, as required by 28 U.S.C.

¹ Petitioner has not named his custodian as the respondent. Rule 2, Rules Governing Section 2254 Cases, requires that the petition name the state officer having custody of the applicant as respondent. The Court takes judicial notice that a proper respondent for North Carolina state prisoners challenging their North Carolina judgment of conviction is the Secretary of the North Carolina Department of Correction. Naming the wrong custodian is a common point of confusion, and the Court assumes that Petitioner wishes to name the proper custodian as respondent. Accordingly, unless Petitioner objects within eleven days of the issuance of this Order, the Petition is deemed from this point forward to be amended to name Alvin W. Keller, Jr., who is currently the Secretary of the North Carolina Department of Correction, as Respondent.

§ 2244(b)(3)(A). *See* AO 241 (MDNC 3/97), *Instructions*, paragraph 5. Because of this pleading failure, the Petition should be dismissed. *In forma pauperis* status will be granted for the sole purpose of entering this Recommendation and Order.

IT IS THEREFORE RECOMMENDED that the Petition be dismissed for failure to apply to the United States Court of Appeals for the Fourth Circuit for an order authorizing this district court to consider the current Petition as is required by 28 U.S.C. § 2244.

IT IS THEREFORE ORDERED that *in forma pauperis* status is granted for the sole purpose of entering this Recommendation and Order.

IT IS FURTHER ORDERED that the Clerk shall send Petitioner a copy of this Recommendation and Order, instruction forms for filing § 2254 petitions in this Court and for filing a Motion for Authorization in the United States Court of Appeals for the Fourth Circuit, an application to proceed *in forma pauperis* (upon request), and four copies of § 2254 petition forms (more copies will be sent on request). Petitioner should keep the original and two copies of the § 2254 petition which can be submitted in this Court if Petitioner obtains approval from the Fourth Circuit.

/s/ L. Patrick Auld

L. Patrick Auld
United States Magistrate Judge

Date: April 16, 2012